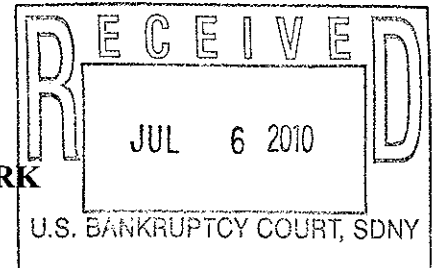


UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



In re:	)	
	)	Chapter 11
DELPHI CORPORATION, <i>et al.</i> ,	)	Case No. 05-44481 [RDD]
	)	
Debtor.	)	Jointly Administered
<hr/>		
DELPHI CORPORATION, <i>et al.</i> ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No.: 07-02500
	)	
MULTITRONICS INC.,	)	
	)	
Defendant.	)	

**REPLY OF MTRONICS TO REORGANIZED DEBTORS' OMNIBUS RESPONSE  
TO MOTIONS SEEKING, AMONG OTHER FORMS OF RELIEF, ORDERS TO  
VACATE CERTAIN PROCEDURAL ORDERS PREVIOUSLY ENTERED  
BY THIS COURT AND TO DISMISS THE AVOIDANCE ACTIONS  
AGAINST THE MOVING DEFENDANTS**

**Introduction**

Mtronics.com, Inc., successor by merger to Multitronics, Inc. ("Mtronics"), files this reply to the *Reorganized Debtors' Omnibus Response to Motions Seeking, Among Other Forms of Relief, Orders to Vacate Certain Procedural Orders Previously Entered by this Court and to Dismiss the Avoidance Actions Against the Moving Defendants* (the "Omnibus Response")<sup>1</sup> filed by Plaintiffs. Mtronics adopts and incorporates by reference the defenses and arguments made by all other defendants in response to the Omnibus Response and in response to the complaints filed against such defendants in the other Adversary Proceedings. Specifically, and without limitation, Mtronics adopts and incorporates by reference the lead reply briefs to the Omnibus

<sup>1</sup> All capitalized terms used herein but not otherwise defined shall have the meaning ascribed to them in the Omnibus Response.

Response submitted by Hewlett Packard (AP No. 07-02262), Wagner Smith (AP No. 07-02581), Johnson Controls (A.P. No. 07-2348), and GKN, MSX, and Valeo (AP. No. 07-02198).

While the arguments set forth in the other defendants' papers apply to Mtronics, Mtronics has a distinguishable and dispositive defense upon which dismissal should be granted. As evidenced by the very affidavits of service filed by Plaintiffs in the lead bankruptcy case, Plaintiffs, in direct contravention of this Court's Order, failed to serve Mtronics with the Preservation Motion, the First Extension Motion, the Second Extension Motion, and the Third Extension Motion (collectively, the "Preservation Motions"). Accordingly, Plaintiffs cannot now claim that Mtronics is bound by the Preservation Order, First Extension Order, Second Extension Order, or Third Extension Order (the "Preservation Orders"). Moreover, as a matter of fundamental due process under the Fifth Amendment of the United States Constitution, this adversary proceeding is due to be dismissed with prejudice. Due process may not be compromised at the behest and convenience of the Plaintiffs, who failed to serve Mtronics with the Preservation Motions, despite the fact that Mtronics was clearly a party in interest and due to be given notice and an opportunity to be heard with respect to such.

### **Undisputed Facts**

Each of the Preservation Motions contains a subsection entitled "Notice of Motion," wherein Plaintiffs represented to the Court that notice of such motion was given in accordance with *Supplemental Order Under 11 U.S.C. §§ 102(1) and 105 and Fed. R. Bankr. P. 2002(m), 9006, 9007, and 9014 Establishing Omnibus Hearing Dates and Certain Notice, Case Management, and Administrative Procedures, entered March 20, 2006* [Docket No. 2883 of Lead Bankruptcy Case 05-44481] (the "Case Management Order").<sup>2</sup> In the Case Management

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<sup>2</sup> See Preservation Motion ¶ 55, First Extension Motion ¶ 26, Second Extension Motion ¶ 27, Third Extension Motion ¶ 24.

Order, this Court specifically directed: “Every filing shall be subject to the filing and notice procedures described herein (the ‘Notice Procedures’). All Filings *shall be served (a) via overnight mail upon all parties with a particularized interest* in the subject of the Filing...” [See Paragraph 15]. “Filings” is defined therein as “every notice, motion or application (each, a ‘Motion’), and all briefs, memoranda, affidavits, declarations, or other documents filed concurrently therewith in these cases.” [See Paragraph 2].

The Preservation Motions were “Filings,” and were required to be served on “all parties with a particularized interest” as directed by the Court in the Case Management Order. Mtronics was clearly a party with a particularized interest in the Preservation Motions, given that Plaintiffs named Mtronics in the Complaint and seek to recover from Mtronics millions of dollars. Under the Court’s Case Management Order, the Federal Rules of Civil Procedure, the United States Constitution, and fundamental rules of fairness and due process, Mtronics was entitled to notice of the Preservation Motions. Nevertheless, in direct contravention of this Court’s Order, Plaintiffs failed to serve Mtronics with any of the Preservation Motions, as verified by the affidavits of service filed with respect to each. [See Docket Nos. 9039, 12970, 13415, and 18967 of Lead Bankruptcy Case 05-44481]. These affidavits of service clearly show that neither Mtronics, nor counsel for Mtronics, was served with copies of any of the Preservation Motions.<sup>3</sup>

On June 22, 2007, Delphi Automotive Systems, LLC (“DAS LLC”), one of the affiliated reorganized debtors comprising the Plaintiffs in this action, sued Mtronics in the United States District Court for the Southern District of Indiana, Civil Action No. 1:07 cv 0811-SEB-JMX (the “Lawsuit”). Additionally, on February 15, 2007, Plaintiffs objected to the proof of claim filed by

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<sup>3</sup> Upon information and belief, an agent authorized to receive service on behalf of Mtronics received the Summons and Complaint on March 29, 2010, thus receiving its first notice approximately 30 months after the adversary proceeding was initiated. On April 16, 2010, Plaintiffs mailed to Mtronics copies of the First Extension Order, Second Extension Order, and Third Extension Order.

Mtronics - Claim No. 12221. [See Docket No. 6968 in Lead Bankruptcy Case 05-44481]. At the very same time that the Plaintiffs were filing the Preservation Motions and obtaining orders from this Court to extend the time to serve Mtronics with the instant preference action, Plaintiffs were in active settlement negotiations with Mtronics regarding the Lawsuit and the objection to Mtronics proof of claim. In fact, the Court approved the settlement between Mtronics and DAS LLC with respect to Mtronics proof of claim on December 14, 2007. [See Docket No. 11466 in Lead Bankruptcy Case 05-44481]. Accordingly, Plaintiffs were well aware of Mtronics' involvement in the Lead Bankruptcy Case, and of Mtronics' representation by counsel, at the time of filing the Preservation Motions and clearly should have been serving the same on Mtronics. Mtronics negotiated and resolved its disputes with Plaintiffs in good faith, and without knowledge of Plaintiffs' secret proceedings. By failing to comply with the Court's notice and service requirements, Plaintiffs unduly and unfairly prejudiced Mtronics' rights.

#### **Argument**

##### **1. Plaintiffs failed to serve the Preservation Motions upon Mtronics in direct contravention of this Court's Case Management Order.**

In each of the Preservation Motions, the Plaintiffs misrepresented to this Court that notice was provided in accordance with this Court's Case Management Order, and that in light of such, no other or further notice was necessary. [See Preservation Motion ¶ 55, First Extension Motion ¶ 26, Second Extension Motion ¶27, Third Extension Motion ¶ 24]. In relying on such misrepresentations, this Court entered each of the Preservation Orders (which had been proposed and submitted by Plaintiffs), and each of which stated that it appeared "that proper and adequate notice of the Motion has been given" and "that no other further notice is necessary." As evidenced by the failure to serve Mtronics with any of the Preservation Motions, not only did Plaintiffs fail to abide by the directives of this Court's Case Management Order, but Plaintiffs

obtained the relief now at issue by specifically misrepresenting to this Court that they had indeed provided notice of the Preservation Motions to all parties of interest, including Mtronics.

Plaintiffs have continued this misrepresentation in their Omnibus Response by representing to the Court that the Preservation Motions were served “on all parties specified in the Case Management Order, Docket No. 18839.” [See Paragraph 37, Footnote 2]. “Case Management Order, Docket No. 18839” expressly adopts the notice provisions of the prior case management orders with respect to the service of Filings, including the Case Management Order [See Paragraph 4 therein]. Having failed to serve Mtronics with the Preservation Motions as required by the Case Management Order, and having misrepresented that they had in fact done so, Plaintiffs are estopped from claiming that Mtronics is bound by the Preservation Orders. Accordingly, the Preservation Orders should be vacated with respect to Mtronics, and this adversary proceeding should be dismissed with prejudice on numerous grounds, including, without limitation, Plaintiffs’ failure to comply with Rule 4(m) of the Federal Rules of Civil Procedures and Plaintiffs’ failure to comply with the two-year statute of limitations imposed by Section 546(a) of the Bankruptcy Code.

**2. Mtronics has been deprived of substantive and procedural due process.**

Apart from Plaintiffs’ failure to abide by the Court’s Case Management Order, Mtronics has clearly been deprived of both its substantive and procedural due process rights as guaranteed by the Fifth Amendment of the Constitution of the United States of America. As established by the United States Supreme Court, due process is meant to ensure the requirement of fundamental fairness, and thus mandates certain procedural protections. Matthews v. Eldridge, 96 S. Ct. 893 (1976). One of these protections, and at the very core of due process, is the fundamental right to notice and the opportunity to be heard at a meaningful time and in a meaningful manner. Id.; see

also Brody v. Village of Port Chester, 434 F.3d 121, 129 (2nd Cir. 2005), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (“[W]here a person has a right to be heard, that right ‘has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.’”).

Mtronics had no notice of the Preservation Motions and had no opportunity to be heard prior to the entry of the Preservation Orders, which orders substantially affected Mtronics’ rights. As established by the Supreme Court, due process forbids the exercise of judicial power substantially affecting a defendant’s rights without notice. See Griffin v. Griffin, 66 S.Ct. 556 (1946). Additionally, these Preservation Motions effectively extended the two year statute of limitations imposed by Section 546(a) of the Bankruptcy Code for an additional 2.5 years. Section 546(a)’s two year statute of limitations is itself a substantive right, See Kilner v. Flocar, 212 F.R.D. 66, 70 (N.D.N.Y. 2002) (“Statutes of Limitation are substantive laws...”). Accordingly, Mtronics has been deprived of both its substantive and procedural due process rights and the Complaint is due to be dismissed with prejudice.

**3. Plaintiffs’ arguments fail to address the notice deficiencies with respect to Mtronics.**

Plaintiffs attempt to hide their failure to abide by both the Court’s Case Management Order and Fifth Amendment due process requirements by littering the Omnibus Response with one-size-fits-all arguments. For example, in Paragraph 3 Plaintiffs cite to the transcript of a recent hearing and state: “At a recent hearing, this Court specifically noted that *many* potential defendants understood, at least at the time the Orders were entered, that they benefit from those Orders.” The Court, with respect to the Preservation Motion, had stated: “And it was on very wide notice...*there were lots and lots* of potential recipients of [p]references who got actual notice of it.” [Transcript, April 1, 2010 at 28, attached to the Fisher Declaration as Ex. D].

Plaintiffs also argue: “*Several* Movants or their affiliates were served with the Preservation Motion and subsequent Extension Motions.” [See Omnibus Response ¶ 69]. While “many” or “lots and lots” or “several” of the other potential defendants might have received notice of the Preservation Motions, the fact remains that Mtronics did not. The Plaintiffs’ affidavits of service with respect to each of the Preservation Motions show that the Plaintiffs did not serve Mtronics. General averments of service on other defendants does not show adequate service on Mtronics.

Plaintiffs attempt to rely upon their Disclosure Statement as another means of covering their failure to provide notice of the Preservation Motions to Mtronics. [See Omnibus Response ¶¶ 15-17, 70]. However, Mtronics was not served with the Disclosure Statement as evidenced by the affidavit of service. [See Docket No. 11972 of the Lead Bankruptcy Case 05-44481]. Plaintiffs further note that they filed the Disclosure Statement with their Form 8-K. A Form 8-K, which is filed with the Securities and Exchange Commission for the benefit of shareholders, does not constitute service of process under the Federal Rules of Civil Procedure, nor does it satisfy the Case Management Order or the procedural requirements of due process.<sup>4</sup>

### Conclusion

Plaintiffs advance numerous additional arguments that Mtronics submits are inapposite and without merit. In addition to joining in the defenses made by the other defendants seeking dismissal of the Adversary Proceedings, Mtronics submits that in failing to provide Mtronics with notice of the Preservation Motions, Plaintiffs not only failed to abide by this Court’s Case Management Order, but deprived Mtronics of both substantive and procedural due process.

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<sup>4</sup> Even if Mtronics had been served with the Disclosure Statement, the brief description therein of the Preservation Order could not and did not satisfy the notice requirements for the Preservation Motion as required by the Case Management Order, the Federal Rules of Civil Procedure, and the procedural rights of due process given that the Preservation Motion had already been filed and heard. Additionally, it should be noted that the Disclosure Statement, while briefly describing the Preservation Order, could not possibly have given notice of the First Extension Motion, Second Extension Motion, or Third Extension Motion, and the orders thereto, given that such motions were not filed until long after the filing of the Disclosure Statement.

Mtronics received absolutely no notice of Plaintiffs' intentions to file the subject avoidance actions under seal and to extend the time for service of such actions for approximately 2.5 years beyond the expiration of the statute of limitations. Without any notice of these Preservation Motions and the effect which such motions would potentially have, Mtronics was deprived of its fundamental right to plan and prepare for, and defend against the instant adversary proceeding. Additionally, Mtronics was unduly and unfairly prejudiced in its settlement negotiations with Plaintiffs, which Mtronics negotiated in good faith and without any knowledge of Plaintiffs' secret proceedings. For these reasons, and for the reasons set forth in the papers submitted by the other moving defendants, Mtronics respectfully requests that the Court dismiss the Complaint with prejudice.

Respectfully submitted this the 2nd day of July, 2010.

\s\ Roger Jones

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 2nd day of July, 2010, a copy of the above and foregoing was served electronically through the Court's CM/ECF system to all parties consenting to such service, and via electronic email and/or United States first class mail, properly addressed and postage prepaid, upon the following:

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